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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PACIFIC MARITIME FREIGHT, INC.,
12 Plaintiffs,
13 v.
14 SONIA L. FOSTER; THE FOSTER
15 GROUP, INC.; and DOES 1 through 10,
16 inclusive
17 Defendants.

CASE NO. 10-cv-0578-BTM-BLM

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

16 Defendants Sonia L. Foster and The Foster Group, Inc. have moved to dismiss the
17 complaint [Doc. 4]. For the following reasons, the Motion to Dismiss is **GRANTED in part**
18 and **DENIED in part**.
19

20 **I. BACKGROUND**

21 The Court only recites the allegations in the Complaint that are necessary for the
22 resolution of the pending Motion to Dismiss. The Court's recitation of the alleged facts are
23 taken from the Complaint and are not factual findings.

24 Beginning in 2004, Plaintiff Pacific Maritime Freight, Inc. (d/b/a Pacific Tugboat
25 Service, hereinafter "PTS") employed the services of Defendants Sonia L. Foster and The
26 Foster Group, Inc. to negotiate contracts with the Navy under the General Services
27 Administration Schedules Program ("GSA"). (Compl. ¶ 10.) PTS had no experience with the
28 GSA and was not familiar with its complicated procedures. (Compl. ¶ 53.) Ms. Foster is the

1 sole owner of The Foster Group and she became PTS's sole point of contact with the GSA
2 program, never allowing PTS to communicate with the GSA directly. (Compl. ¶¶11,13, 30.)
3 Beginning in 2004, PTS paid Ms. Foster \$2000 per month, and based on a February 2005
4 contract, Foster was paid \$2500 per month plus a 2% commission on sales procured through
5 her. (Compl. ¶ 11.) Foster's compensation was renegotiated several times, reaching
6 \$15,000 per month in August 2008. (Id.) Foster agreed to exclusively represent PTS.
7 (Compl. ¶ 16.) All "significant discussions, representations, and agreements for Foster
8 Group . . . involved Ms. Foster personally" and Ms. Foster ascribed her success to the good
9 will and trust that she had personally generated with the Navy. (Compl. ¶¶ 11, 15.) PTS
10 described this as a "marketing" program. (Compl. ¶ 13.)

11 As part of this marketing program, Foster secured for PTS a GSA Price List contract,
12 which made PTS eligible to bid on contracts with the Navy. (Compl. ¶ 26.) Foster also
13 secured for PTS contracts for the procurement of tug boats and dive boats. (Compl. ¶¶ 25-
14 28.) In July 2009, however, Foster failed to make efforts to renew PTS's GSA Price List
15 contract. (Compl. ¶ 32.) On September 17, 2009 Foster called the GSA contract specialist
16 and told him that "because of non compliance, she no longer represented" PTS. (Id.) Foster
17 formally terminated the contract with PTS on January 13, 2010. (Compl. ¶ 48.) Between
18 September 2009 and January 2010, Foster continued to assure PTS that she was marketing
19 them to the Navy and she continued to collect monthly fees for her services, totaling about
20 \$200,000. (Compl. ¶¶ 34, 104.) After Foster and PTS severed ties, PTS did not know who
21 to contact in the Navy about renewing contracts, but the deadline for bids was extended so
22 that PTS could submit their bids. (Compl. ¶¶ 53, 55.) Since the termination of the contract,
23 PTS has not lost any contracts for Navy work, but some awards have been delayed. (Compl.
24 ¶ 46.) Foster claims entitlement to a termination bonus fee in the amount of \$90,000.
25 (Compl. ¶ 54.)

26 After Foster terminated the contract, she contacted the Navy and reported that PTS
27 was uncooperative, unreliable, and insolvent. (Compl. ¶ 49.) Foster also suggested to the
28 Navy that the Naval Criminal Investigative Service was investigating PTS, even though a

1 JAG inquiry revealed this to be untrue. (*Id.*) She also pressured one of PTS's
2 subcontractors, Metal Shark, to submit a high bid so that PTS would not be competitive
3 against her new client. (Compl. ¶ 57.) PTS fears that Metal Shark will fail to perform and
4 that the Navy will no longer award them contracts. (Compl. ¶ 57.) Though PTS has not yet
5 lost any Navy contracts and subcontractors like Metal Shark have not yet repudiated, PTS
6 has incurred expenses repairing its relationships with the Navy and their subcontractors.
7 (Compl. ¶ 113.)

8 After Foster terminated the contract, PTS also discovered what it described as
9 "phantom GSA listings." (Compl. ¶ 35.) Foster had placed items on PTS's GSA Price List
10 that were not sold by PTS and had nothing to do with PTS's business, like a sonic repelling
11 device. (*Id.*) Foster would also occasionally pressure PTS to submit one-time bids for
12 contracts outside of their product line, causing PTS to incur costs attendant to preparing the
13 bids. (Compl. ¶¶ 40, 43.) PTS suspects that the phony bids were submitted to create the
14 illusion of competition, because Department of Defense guidelines require three bids on a
15 product before a contract is awarded. (Compl. ¶ 44.)

16 After Foster terminated the contract, PTS contacted Foster about retrieving trade-
17 secret information that she had gathered throughout their contractual relationship. (Compl.
18 ¶ 61.) In a letter dated February 11, 2010, Foster refused to return the trade-secret
19 information, declaring that The Foster Group would not divulge trade secrets to competitors.
20 (Compl. ¶ 62.) PTS notes that such a promise would only prevent Foster from sharing trade
21 secrets with competitors, but Foster is free to use PTS's trade secrets while preparing bids
22 for the competitors. (Compl. ¶ 64.)

23 The Complaint alleges nine claims against Sonia Foster, The Foster Group, and ten
24 Doe defendants: (1) breach of fiduciary duty (generally), (2) breach of fiduciary duty
25 (phantom GSA listings), (3) breach of the implied covenant of good faith and fair dealing, (4)
26 breach of contract, (5) fraud, (6) intentional interference with prospective economic
27 advantage, (7) trade-secret misappropriation and unfair competition, (8) rescission, and (9)
28 a declaration that no future compensation is due to defendants. Plaintiffs also seek a variety

1 of equitable remedies including an injunction. Defendants have moved to dismiss all claims
2 for lack of subject-matter jurisdiction, to dismiss all nine claims against Ms. Foster in her
3 individual capacity, and to dismiss claim five for fraud and claim six for intentional
4 interference with prospective economic advantage against The Foster Group, Inc.

5 6 **II. LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth
8 a “short and plain statement of the claim showing that the pleader is entitled to relief,” and
9 “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”
10 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). When reviewing a motion to
11 dismiss, the allegations of material fact in plaintiff’s complaint are taken as true and
12 construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v.
13 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). But only factual allegations must be
14 accepted as true—not legal conclusions. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
15 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
16 statements, do not suffice.” Id. Although detailed factual allegations are not required, the
17 factual allegations “must be enough to raise a right to relief above the speculative level.”
18 Twombly, 550 U.S. at 555. Furthermore, “only a complaint that states a plausible claim for
19 relief survives a motion to dismiss.” Iqbal, 129 S. Ct. at 1949.

20 For claims of fraud, Federal Rules of Civil Procedure 9(b) requires that the plaintiff
21 “must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ.
22 P. 9(b). Normally, this particularity requires the “times, dates, places, benefits received, and
23 other details of the alleged fraudulent activity.” Neubronner v. Milken, 6 F.3d 666, 672 (9th
24 Cir. 1993). However, the standard of particularity “may be relaxed with respect to matters
25 within the opposing party’s knowledge.” Id. In such cases, the plaintiff “should include the
26 misrepresentations themselves with particularity and, where possible, the roles of the
27 individual defendants in the misrepresentations.” Moore v. Kayport Package Exp., Inc., 885
28 F.2d 531, 540 (9th Cir. 1989).

III. DISCUSSION

A. Issue of Doe Defendants Is Moot

Defendants assert that the inclusion of Doe defendants presumptively destroys diversity.¹ But after Defendants filed their motion, Plaintiff voluntarily dismissed all Doe defendants [Doc. 5]. The inclusion of the Doe defendants was the sole basis for the Defendants' 12(b)(1) motion to dismiss, and their dismissal perfects diversity. See Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1154 (9th Cir. 1998) ("Rule 21 specifically allows for the dismissal of parties at *any stage of the action*. There is no requirement that diversity exist at the time of the filing of the complaint [I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable non-diverse party to be dropped at any time, even after judgment has been rendered.") (internal quotation marks and citations omitted). Accordingly, the motion is **DENIED** as moot.

B. Fraud Claim

Defendants assert that the Plaintiff's fraud claim is not distinct from their breach of contract claim, and that even if it is, it is not pleaded with sufficient particularity under Federal Rules of Civil Procedure 9(b).

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¹The inclusion of Doe defendants does not presumptively destroy diversity. Defendants rely on outdated precedents inconsistent with Lindley v. General Elec. Co., 780 F.2d 797 (9th Cir. 1986). In Lindley, the Ninth Circuit held that Doe defendant statutes are part of state substantive law that should be applied in diversity cases under the Erie doctrine. Id. at 800-01. Hawaii cases (which have interpreted the Hawaii rule on Doe defendants to be the same as the California statute) have held that the inclusion of Doe defendants does not presumptively destroy diversity, but that the plaintiff runs the risk of the statute of limitations expiring if a non-diverse Doe defendant is discovered and the case must be refiled in state court. Macheras v. Center Art Galleries-Hawaii, 776 F. Supp. 1436, 1440 (D. Haw. 1991); Fat T v. Aloha Tower Associates Piers 7, 8, and 9, 172 F.R.D. 411, 414 (D. Haw. 1996). Disallowing a presumption of non-diversity for Doe defendants in 28 U.S.C. § 1332 actions is consistent with recent revisions to 28 U.S.C. § 1441, which states that for purposes of removal jurisdiction "the citizenship of defendants sued under fictitious names shall be disregarded."

1 1. The Fraud Claim Is Pleaded With Particularity

2 “The elements of fraud, which give rise to the tort action for deceit, are (a)
3 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of
4 falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and
5 (e) resulting damage.” Lazar v. Superior Court, 12 Cal.4th 631, 909 P.2d 981 (1996). Each
6 element of fraud must be pled with particularity under Rule 9(b).

7 Foster was the “sole point of contact” with the GSA Program. (Compl. ¶ 13.) PTS
8 was not privy to the details of negotiations between Foster and the Navy. (Compl. ¶ 30.)
9 Foster so completely controlled negotiations that after Foster and PTS severed ties, PTS did
10 not know who to contact in the Navy about renewing contracts. (Compl. ¶ 53.) The allegedly
11 phony bids and phantom competition were not discovered until after Foster and PTS severed
12 ties. (Compl. ¶ 35.) All of the alleged misrepresentations were made during Foster’s
13 contacts with GSA program personnel, and because Foster was the sole point of contact and
14 PTS had nothing to do with the process, the details of the alleged misrepresentations are
15 exclusively within Foster’s knowledge. PTS is thus subject to the relaxed 9(b) standard.

16 Under the relaxed Rule 9(b) standard, PTS has pled the misrepresentations
17 themselves with sufficient particularity. The misrepresentations at issue involve Foster
18 assuring PTS that she was marketing them to the GSA program when she was not doing so.
19 Defendants dispute the generality of the description of the complaint, which identifies the time
20 of the misrepresentation as being “on or about July 2009.” (Compl. ¶ 102.) Earlier in the
21 complaint PTS is more specific, describing that in July 2009 the GSA contract specialist
22 contacted Foster about renewing the GSA Price List contract. (Compl. ¶ 32.) Foster did not
23 respond until September 17, 2009, when she told the GSA contract specialist that she no
24 longer represented PTS. (Id.) Foster concealed the contact (or lack thereof) from PTS, and
25 PTS reasonably relied on Foster’s misrepresentation that business was going as usual by
26 continuing to pay Ms. Foster her fees until the contract was formally terminated on January
27 13, 2009. (Compl. ¶¶ 34, 102.) By pleading the elements of fraud and the who, what, when,
28 and how of the misrepresentations, PTS has sufficiently fulfilled the standard of Rule 9(b) and

1 given notice of their claim.

2
3 2. Distinctness From Breach-of-Contract Claim

4 In addition to challenging whether Plaintiff pleaded its claim with particularity,
5 Defendants also contend that the fraud claim is indistinct from Plaintiff's breach-of-contract
6 claim.

7 Defendant relies on Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 1182 (1993), where the
8 California Supreme Court "declined to extend tort remedies for breach of the good faith
9 covenant in a contract employment." In Hunter, an employee suffered constructive
10 termination without cause, and in addition to a wrongful termination claim brought a fraud
11 claim based on a misrepresentation that there had been a meeting preceding his termination
12 when there in fact had not. Id. at 1179. Beyond the numerous self described limitations in
13 Hunter,² Defendants' reliance on this case is misplaced. The essence of the Hunter decision
14 is that there was no fraud independent of the breach of contract because the elements of an
15 independent fraud claim were not fulfilled: "It cannot be said that Hunter relied to his
16 detriment on the misrepresentation in suffering constructive termination. Thus, the fraud
17 claim here is without substance." Id. at 1184. The damage suffered by the plaintiff in Hunter
18 was not the result of reliance on a misrepresentation, but rather simply the result of the
19 defendant's breach of contract.³

20 The damage claimed by Plaintiff in this case, however, was in part the result of
21 justifiable reliance on Defendants' alleged misrepresentations. As discussed in the preceding
22 section, Foster made misrepresentations about her performance that she knew to be false
23 in order to secure payment from Plaintiff. Plaintiff relied on Foster's misrepresentation that

24
25 ²The Hunter Court noted limitations based on the "fundamentally contractual"
26 employment relationship, the necessity of employer discretion, and the exclusive remedy
provisions of the workers' compensation system. Hunter, 6 Cal. 4th at 1181-82.

27 ³The same can be said for Defendants' other authority, Applied Equipment Corp. v.
28 Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 515 (1994): "Conduct amounting to a breach of
contract becomes tortious only when it also violates an independent duty arising from
principles of tort law." Such a duty, of course, would be violated by conduct fulfilling all of the
elements of fraud.

1 she was still working to secure contracts for Plaintiff by continuing to pay her monthly fees.
 2 Plaintiff's reliance was justifiable because for several years Foster had been active and
 3 successful in securing contracts. Plaintiff's justifiable reliance was damaging because
 4 Plaintiff paid \$90,000 over six months without receiving any benefit from Defendants. Unlike
 5 Hunter, all of the elements of Plaintiff's fraud claim are fulfilled. Accordingly, Defendants'
 6 motion to dismiss the fraud claim against The Foster Group, Inc. is **DENIED**.

7 8 **C. Intentional Interference with Prospective Economic Advantage Claim**

9 Defendants assert that Plaintiff has not sufficiently pled its Intentional Interference with
 10 Prospective Economic Advantage ("IPEA") claim. An IPEA claim consists of six elements:
 11 "(1) an economic relationship between broker and vendor or broker and vendee containing
 12 the probability of future economic benefit to the broker, (2) knowledge by the defendant of
 13 the existence of the relationship, (3) intentional acts on the part of the defendant designed
 14 to disrupt the relationship, (4) actual disruption of the relationship, (5) damages to the plaintiff
 15 proximately caused by the acts of the defendant" and (6) "conduct that was wrongful by some
 16 legal measure other than the fact of interference itself." Della Penna v. Toyota Motor Sales,
 17 U.S.A., Inc., 11 Cal. 4th 376, 389, 393 (1995). Defendants assert that Plaintiff failed to plead
 18 the fifth element, actual economic harm.

19 Defendants correctly assert that PTS has not yet lost any Navy contracts, and that its
 20 subcontractors have not yet betrayed PTS. (Pl.'s Opp'n, 11:9-19.) In other words, PTS has
 21 not yet sustained any damages. Consequential damages, however, are also recoverable in
 22 an IPEA action. Restatement (Second) of Torts § 774A(1)(b) (1979).

23 According to the Restatement, one who intentionally interferes with prospective
 24 economic advantage can be held liable for "consequential losses" and even "actual harm to
 25 reputation." Id. PTS has pled consequential losses that have stemmed from attempts to
 26 preempt any loss of contracts, alleging that it has incurred "additional expenses" in an effort
 27 to repair its relationship with the Navy. (Compl. ¶ 113.) The Restatement position has been
 28 adopted in California. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134,

1 1156-64 (2003). See also Drouet v. Moulton, 245 Cal. App. 2d 667, 672 (1966) (allowing
2 recovery on IIPEA claim for consequential and reputational damages).

3 Plaintiff has pled consequential damages in support of its IIPEA claim. Accordingly,
4 the Court **DENIES** Defendants' motion to dismiss Plaintiff's IIPEA claim against The Foster
5 Group.

7 **D. Claims Against Ms. Foster in Her Individual Capacity**

8 Although Ms. Foster was not a party to the contract, Plaintiff has pleaded an alter-ego
9 theory of liability against her. Defendants assert that Plaintiff has not properly pleaded an
10 alter-ego theory of liability, so all the claims against Ms. Foster in her individual capacity
11 should be dismissed. The Court first addresses the elements of alter-ego liability, then
12 discusses alter-ego liability has been pled with respect to each claim.

14 1. Alter-Ego Liability

15 Alter-ego liability allows a plaintiff to "pierce the corporate veil" and hold a corporate
16 actor or parent corporation liable for the conduct of the corporation or subsidiary. Stark v.
17 Coker, 20 Cal. 2d 839, 845 (1942). Disregarding the corporate form, however, is an
18 "extreme remedy, sparingly used." Sonora Diamond Corp. v. Superior Court, 83 Cal. App.
19 4th 523, 538 (2000). As such, alter-ego liability is only employed "in narrowly defined
20 circumstances and only when the ends of justice so require." Mesler v. Bragg Management
21 Co., 39 Cal. 3d 290, 301 (1985). To properly plead an alter-ego theory of liability, a plaintiff
22 must plead the elements of the theory and factors to support those elements. The two
23 elements are "(1) that there be such unity of interest and ownership that the separate
24 personalities of the corporation and the individual no longer exist and (2) that, if the acts are
25 treated as those of the corporation alone, an inequitable result will follow." Automotriz Del
26 Golfo De California S. A. De C. V. v. Resnick, 47 Cal. 2d 792, 796 (1957). Factors that can
27 be used to support the first element, unity of interest, include commingling of funds, failure
28 to maintain minutes or adequate corporate records, identification of the equitable owners with

1 the domination and control of the two entities, the use of the same office or business
 2 locations, the identical equitable ownership of the two entities, the use of a corporation as a
 3 mere shell, instrumentality or conduit for a single venture or the business of an individual, and
 4 the failure to adequately capitalize a corporation. Associated Vendors, Inc. v. Oakland Meat
 5 Co., 210 Cal. App. 2d 825, 838-40 (1962). The second element requires that an inequitable
 6 result occur by the recognition of the corporate form. Sonora Diamond Corp., 83 Cal. App.
 7 4th at 539.

8 Plaintiff has pled the elements of alter-ego liability, alleging the “unity of interest” and
 9 “no practical separation” between Ms. Foster and The Foster Group for the first element and
 10 the danger that treating the actions as those of The Foster Group alone will create “an
 11 inequitable result” for the second element. (Compl. ¶ 7).⁴ Plaintiff pleads enough factors to
 12 support the unity-of-interest element, but the second element of an inequitable result is not
 13 satisfied for every claim.

14
 15 i. Unity of Interest

16 Defendants erroneously rely on a case decided at the summary judgment stage where
 17 none of the factors indicating alter-ego status were included in any allegation. Wady v.
 18 Provident Life and Accident Ins. Co. of America, 216 F. Supp. 2d 1060, 1067 (C.D. Cal.
 19 2002). Wady has been specifically identified as unhelpful for determining the sufficiency of
 20 a pleading for a motion to dismiss. Monaco v. Liberty Life Assur. Co., No. C06-07021, 2007
 21 WL 1140460, at *6 (N.D. Cal. Apr. 17, 2007). Instead, cases resolving a 12(b)(6) motion to
 22 dismiss should be examined for precedential value. The identification of the elements of
 23 alter-ego liability plus two or three factors has been held sufficient to defeat a 12(b)(6) motion
 24 to dismiss. Federal Reserve Bank of San Francisco v. HK Systems, No. C-95-1190, 1997
 25 WL 227955, at *6 (N.D. Cal. Apr. 24, 1997). In HK Systems, the plaintiff pled the factors of
 26

27 ⁴Defendants’ cases, which fail to even state these elements of an alter-ego theory, are
 28 empty criticisms. See Hokama v. E.F. Hutton & Co., Inc., 566 F.Supp. 636, 647 (C.D. Cal.
 1983) (dismissing alter-ego theory for failing to even state the elements of the theory);
Hockey v. Medhekar, 30 F.Supp.2d 1209, 1211 n.1 (N.D. Cal. 1998) (same).

1 domination and control, disregard for the corporate form, and undercapitalization, and this
 2 was enough to defeat a 12(b)(6) motion to dismiss. Id.; see also Axon Solutions, Inc. v. San
 3 Diego Data Processing Corp., No. 09 CV 2543, 2010 WL 1797028, at *3 (S.D. Cal. May 4,
 4 2010) (denying motion to dismiss alter-ego theory when plaintiff pled commingling of funds,
 5 undercapitalization, and representation by one entity that it is liable for the other's debts);
 6 Resnick, 47 Cal. 2d at 796-97 (finding unity of interest based on failure to issue stock and
 7 undercapitalization).

8 In this case, PTS has pled commingling of funds and domination and control. At the
 9 beginning of the relationship between Plaintiff and Defendants in late 2004 to early 2005,
 10 PTS made payments directly to Ms. Foster, suggesting a commingling of funds between Ms.
 11 Foster and The Foster Group. (Compl. ¶ 11.) See New Cingular Wireless Services, Inc. v.
 12 McCormick, No. 2:07-cv-02213, 2008 WL 4283526, at *5 (E.D. Cal. Sept. 11, 2008)
 13 (observing that payments for services of a corporation made out to an individual constituted
 14 commingling of funds that could support a finding of alter-ego liability). Ms. Foster is the sole
 15 owner of The Foster Group, and she exclusively handled all interactions with the Navy and
 16 GSA herself, indicating her domination and control of The Foster Group. (Compl. ¶¶ 11, 13.)
 17 Ms. Foster also attributed her success to the trust and good will that she has built up with the
 18 Navy personally, and that she uses her personal reputation and influence, indicating that she
 19 treats The Foster Group as a personal extension. (Compl. ¶¶ 15, 13.) See Kirby Morgan
 20 Dive Systems v. Hydrospace Ltd., No. CV 09-4934, 2010 WL 234791, at *5 (C.D. Cal. Jan.
 21 13, 2010) (affirming an arbitration award based partly on alter-ego liability where sole
 22 ownership of the company constituted unity of interest). Sole ownership alone is often
 23 enough to defeat a motion to dismiss, and when taken with the commingling of funds, PTS
 24 has sufficiently pled a unity of interest between Ms. Foster and The Foster Group, Inc. See
 25 Paul v. Palm Springs Homes Inc., 192 Cal. App. 2d 858, 863 (1961) (holding that sole
 26 ownership was enough to show unity of interest to state a cause of action under alter-ego
 27 liability); Viera v. Chehaiber, No. ED CV:08-00182, 2010 WL 960347, at *3 (C.D. Cal. Mar.
 28 16, 2010) (same).

1 ii. Inequitable Result

2 PTS has not pled for every claim how recognizing the corporate form of The Foster
3 Group, Inc. promotes injustice. PTS does allege numerous instances of bad-faith conduct,
4 including misrepresentation and willful breach. And while California courts generally require
5 evidence of some bad-faith conduct to fulfill the second prong of alter-ego liability, that bad-
6 faith conduct must make it inequitable to recognize the corporate form. Mid-Century Ins. Co.
7 v. Gardner, 9 Cal. App. 4th 1205, 1213 (1992). Inequitable results flowing from the
8 recognition of the corporate form include the frustration of a meritorious claim, perpetuation
9 of a fraud, and the fraudulent avoidance of personal liability. Hennessey's Tavern, Inc. v.
10 American Air Filter Co., 204 Cal. App. 3d 1351, 1359 (1988). California courts have held that
11 the difficulty in collecting a judgment, as from an undercapitalized subsidiary, does not fulfill
12 the requirement of injustice. Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc., 99 Cal. App. 4th
13 228, 245 (2002).

14 To hold Ms. Foster individually liable for each claim, PTS must plead an inequitable
15 result *for each claim*. When an individual is found to be the alter ego of a corporation, this
16 does not dissolve the corporation. Mesler, 39 Cal. 3d at 300. Rather, to serve the ends of
17 justice, the corporate entity is disregarded only in that limited circumstance, and “so far as
18 there are any legitimate objectives to be gained by having two separate corporate entities,
19 these remain undisturbed.” McLaughlin v. L. Bloom Sons Co., 206 Cal.App.2d 848, 854
20 (1962). Without pleading an inequitable result each time, PTS does not show why the
21 corporate entity of the Foster Group should otherwise be disturbed. See Mesler, 39 Cal. 3d
22 at 301 (“under certain circumstances a hole will be drilled in the wall of limited liability erected
23 by the corporate form; for all purposes other than that for which the hole was drilled, the wall
24 still stands”). To hold otherwise would ignore the presumption of corporate separateness and
25 the essence of alter-ego theory. See Mid-Century Ins. Co., 9 Cal. App. 4th at 1212 (“[i]t is
26 the plaintiff's burden to overcome the presumption of the separate existence of the corporate
27 entity”). Alter-ego theory is essentially an equitable tool used to vindicate the rights of those
28 damaged by the abuse of the corporate form. See Mesler, 39 Cal. 3d at 301; Kohn v. Kohn,

1 95 Cal. App. 2d 708, 718 (1950). The requirement of an inequitable result ensures that the
 2 corporate form is disregarded only when justice so requires; to allow a single claim of abuse
 3 to bootstrap all other claims in a lawsuit would apply an equitable tool without showing that
 4 equity requires it.

5
 6 a. First and Second Claims for Breach of Fiduciary Duty

7 Plaintiff has not specifically pled why holding The Foster Group alone liable for the
 8 general breach of fiduciary duty or regarding the phantom GSA listings would promote
 9 injustice. While the claim may state bad-faith conduct, it does not state how the corporate
 10 form was abused to perpetrate it. On this pleading, Ms. Foster cannot be held liable in her
 11 individual capacity for breach of fiduciary duty (generally) or breach of fiduciary duty
 12 (phantom GSA listings) on an alter-ego theory of liability.⁵

13
 14 b. Third Claim: Breach of Implied Covenant of Good Faith and Fair Dealing

15 Similarly, Plaintiff has not pled why holding only The Foster Group liable for its alleged
 16 breach of the implied covenant of good faith and fair dealing and breach of contract promotes
 17 injustice. On this pleading, Ms. Foster cannot be held liable in her individual capacity for
 18 breach of the implied covenant of good faith and fair dealing on an alter-ego theory of liability.
 19 Accordingly, the Court **GRANTS** Defendants' motion and the claim of breach of the implied
 20 covenant of good faith and fair dealing against Ms. Foster in her individual capacity is
 21 **DISMISSED without prejudice.**

22
 23 c. Fourth Claim: Breach of Contract

24 Plaintiff has not pled why it is necessary to hold Ms. Foster individually liable for the
 25 breach-of-contract claim to avoid injustice. On this pleading, Ms. Foster cannot be held liable
 26 in her individual capacity for breach of contract on an alter-ego theory of liability.

27
 28 ⁵ This claim is not dismissed, however, because Plaintiff has may use corporate-
 director liability as a basis to sue Ms. Foster individually. This is discussed in more detail
 below.

1 Accordingly, the Court **GRANTS** Defendants' motion and the claim of breach of contract
2 against Ms. Foster in her individual capacity is **DISMISSED without prejudice**.

3
4 d. Fifth Claim: Fraud, and Sixth Claim: Intentional Interference with
5 Prospective Economic Advantage

6 Ms. Foster herself allegedly committed fraudulent acts and the intentional interference
7 with prospective economic advantage, so she can be held personally liable for them without
8 the use of the alter-ego theory. The Court **DENIES** Defendants' motion to dismiss these
9 claims against Ms. Foster in her individual capacity.

10
11 f. Seventh Claim: Trade-Secret Misappropriation and Unfair Competition

12 PTS shows that piercing the corporate veil is warranted regarding the
13 misappropriation-of trade-secrets and unfair-competition claims. PTS notes Foster's
14 uncooperativeness in returning proprietary information, and that Ms. Foster could technically
15 remain in compliance with the contract by not using the proprietary information as The Foster
16 Group while still retaining it as an individual. (Compl. ¶ 64.) Recognizing the corporate form
17 could deprive PTS of remedies to retrieve their proprietary information or enforce its non-use,
18 and the deprivation of remedies by the corporate form has been held to be exactly the type
19 of inequity that allows the application of alter-ego liability. See Axon Solutions, Inc., 2010 WL
20 1797028, at *3 (deprivation of remedies by recognizing corporate form warrants application
21 of alter-ego liability). Accordingly, the Court **DENIES** Defendants' motion to dismiss the
22 trade-secret misappropriation and unfair-competition claims against Ms. Foster in her
23 individual capacity.

24
25 g. Eighth Claim: Rescission

26 "Rescission is *not* a cause of action; it is a remedy." Nakash v. Superior Court, 196
27 Cal. App. 3d 59, 70 (1987) (emphasis in original); accord Tiqui v. First Nat'l Bank of Az., No.
28 09cv1750, 2010 WL 1345381, at *7 (S.D. Cal. Apr. 5, 2010); Watkinson v. MortgageIT, Inc.,

No.10cv00327, 2010 WL 2196083, at *4 (S.D. Cal. June 1, 2010). The Court construes this cause of action as a request for relief and declines to dismiss it.

h. Ninth Claim: Declaration That No Future Compensation is Due to Defendants

PTS seeks a declaratory judgment that no future compensation is owed to Defendants under the contract. Declaratory judgment is a remedy that is granted at the discretion of the court. McGraw-Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342 (9th Cir. 1966). Even though declaratory judgment is a remedy, it is often brought as an independent claim or counterclaim with elements that must be proven. Classic Media, Inc. v. Mewborn, 532 F.3d 978, 980 (9th Cir. 2008) (claim and counterclaim for declaratory judgment); Mitchell v. Riddell, 402 F.2d 842, 844 (9th Cir. 1968) (two causes of action for declaratory judgment). One of the elements considered by the court is whether a declaratory judgment will settle the controversy at issue. McGraw-Edison Co., 362 F.2d at 342. Because Ms. Foster allegedly controls The Foster Group, the Court may issue a declaratory judgment that applies to both Defendants regarding whether Plaintiff owes them any future compensation. This claim can be asserted against Ms. Foster directly and there is no need to show alter-ego liability.

The Court **DENIES** Defendants' motion to dismiss the declaratory-judgment claim against Ms. Foster in her individual capacity.

2. Personal Liability of Corporate Directors

Separate from alter-ego liability, PTS has also pled that Ms. Foster has committed torts that would expose her to personal liability as a corporate director. Corporate directors may be held individually liable for tortious conduct that they authorized, directed, or participated in. United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970). Corporate directors may be held individually liable for tortious conduct regardless of whether or not the conduct was performed on behalf of the corporation or whether the corporation is held liable. Frances T. v. Village Green Owners Assn., 42 Cal. 3d 490, 504

1 (1986). Plaintiff pleads five tort claims: breach of fiduciary duty (generally), breach of
2 fiduciary duty (phantom GSA listings), fraud, IIPEA, and trade-secret misappropriation and
3 unfair competition.

4 PTS has pled that Ms. Foster is the sole actor of The Foster Group, Inc., so she was
5 a participant in all alleged tortious conduct.

6
7 i. First Claim: Breach of Fiduciary Duty (Generally)

8 Defendants have not otherwise challenged the sufficiency of the pleading for the first
9 claim. Accordingly, Defendants' motion to dismiss the claim for breach of fiduciary duty
10 (generally) against Ms. Foster in her individual capacity is **DENIED**.

11
12 ii. Second Claim: Breach of Fiduciary Duty (Phantom GSA Listings)

13 For the same reason, Defendants' motion to dismiss the second claim for breach of
14 fiduciary duty (phantom GSA listings) against Ms. Foster in her individual capacity is
15 **DENIED**.

16
17 iii. Fifth Claim: Fraud

18 The Court has already denied Defendants' motion to dismiss this claim against Ms.
19 Foster in her individual capacity because Plaintiff asserts this claim against Ms. Foster
20 directly.

21
22 iv. Sixth Claim: Intentional Interference with Prospective Economic Advantage

23 The only challenge to the sufficiency of the IIPEA pleading was addressed in section
24 C. IIPEA is tortious conduct, and as a participant in that conduct Ms. Foster can be held
25 individually liable. Accordingly, the court **DENIES** Defendants' motion to dismiss the IIPEA
26 claim against Ms. Foster in her individual capacity.

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28 //

1 v. Seventh Claim: Trade-Secret Misappropriation and Unfair Competition

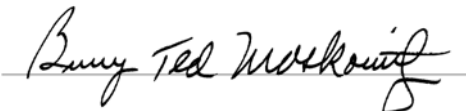
2 Defendants' motion to dismiss the claim against Ms. Foster in her personal capacity
3 for trade-secret misappropriation has already been denied because of a successful pleading
4 of alter-ego liability in section D(1)(ii)(f). Recognizing that Ms. Foster could be held
5 personally liable as a corporate director engaged in tortious conduct for trade secret
6 misappropriation would also be enough to defeat Defendants' motion to dismiss.

7
8 **IV. CONCLUSION**

9 For the foregoing reasons, the Motion to Dismiss [Doc. 4] is **GRANTED in part** and
10 **DENIED in part**. The Court **DISMISSES without prejudice** the claims for breach of contract
11 and breach of the covenant of good faith and fair dealing against Ms. Foster in her individual
12 capacity. The Court declines to dismiss the claims for breach of fiduciary duty (generally),
13 breach of fiduciary duty (phantom GSA listings), fraud, IIPEA, and trade-secret
14 misappropriation and unfair competition against Ms. Foster in her individual capacity and the
15 claims for fraud and IIPEA against The Foster Group. The motion to dismiss for lack of
16 subject matter jurisdiction is **DENIED** as moot.

17 **IT IS SO ORDERED.**

18 DATED: August 24, 2010

19 
20 Honorable Barry Ted Moskowitz
21 United States District Judge
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